

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
Petitioner,)
v.) No. 22-915
ZACKEY RAHIMI,)
Respondent.)

Pages: 1 through 105

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6 ZACKEY RAHIMI,)
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10 Washington, D.C.

11 Tuesday, November 7, 2023

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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20 of the Petitioner.

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22 Amarillo, Texas; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 22-915, United
5 States versus Rahimi.

6 General Prelogar.

7 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

8 ON BEHALF OF THE PETITIONER

19 To address that acute threat, Congress
20 and 48 states and territories temporarily disarm
21 individuals subject to domestic violence
22 protective orders. Congress designed Section
23 922(g)(8) to target the most dangerous domestic
24 abusers. It applies only if, after notice and a
25 hearing, a court makes an express finding that

1 the person poses a credible threat to an
2 intimate partner's physical safety or imposes a
3 specific prohibition on the use of physical
4 force, and the disarmament lasts only as long as
5 the order remains in effect.

6 The Fifth Circuit profoundly erred in
7 reading this Court's decision in Bruen to
8 prohibit that widespread common-sense response
9 to the deadly threat of armed domestic violence.
10 Like Heller and McDonald, Bruen recognized that
11 Congress may disarm those who are not
12 law-abiding, responsible citizens.

13 That principle is firmly grounded in
14 the Second Amendment's history and tradition.
15 Throughout our nation's history, legislatures
16 have disarmed those who have committed serious
17 criminal conduct or whose access to guns poses a
18 danger, for example, loyalists, rebels, minors,
19 individuals with mental illness, felons, and
20 drug addicts.

21 Rahimi offers no historical evidence
22 that those laws were thought to violate the
23 right to keep and bear arms or that the Second
24 Amendment was originally understood to prevent
25 legislatures from disarming dangerous

1 individuals.

2 Despite all that, the Fifth Circuit
3 held that Section 922(g)(8) is facially
4 unconstitutional because the founding generation
5 didn't disarm domestic abusers in particular.
6 But Bruen specifically approved that kind of
7 demand for a historical twin. The Fifth
8 Circuit's approach departs from the Second
9 Amendment's original meaning and would enact the
10 very sort of regulatory straitjacket that this
11 Court disclaimed in Bruen.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: General, would you
14 just briefly define what you mean by
15 "law-abiding and responsible"?

16 GENERAL PRELOGAR: Of course, Justice
17 Thomas. So I would break that into its two
18 constituent components. With respect to those
19 who are not law-abiding, history and tradition
20 shows that that's defined by those who have
21 committed serious crimes defined by the
22 felony-level punishment that can attach to those
23 crimes.

24 This case focuses on the "not
25 responsible citizens" principle, and in this

1 context, we think that history and tradition
2 show that it applies to those whose possession
3 of firearms would pose an unusual danger, beyond
4 the ordinary citizen, with respect to harm to
5 themselves or harm to others.

6 JUSTICE THOMAS: What if someone --
7 this is a civil action. I think we could agree
8 on the -- if this were -- these were criminal
9 proceedings. What if someone is categorized as
10 irresponsible for not storing firearms properly?

11 GENERAL PRELOGAR: So I think that
12 there would be a history and tradition to
13 support the idea that if someone has improperly
14 stored their firearms and thus demonstrated by
15 their conduct that they're not fit to keep and
16 bear arms, they would fit within this category
17 of those who are not responsible. And -- and
18 there were a number of historical laws that
19 operated that way, for example, those who had
20 improperly stored gunpowder and caused the risk
21 of explosions.

22 JUSTICE THOMAS: Below, you in your --
23 you -- you had a list of classes of individuals
24 who were excluded in -- in your opening
25 argument. Now below you included in that class

1 or in those classes slaves and Native Americans.

2 Why did you drop those classes?

3 GENERAL PRELOGAR: We haven't invoked
4 those laws at this stage of the proceedings
5 because we think that they speak to a distinct
6 principle and the textual hook that at the
7 particular point in time those categories of
8 people were viewed as being not among the people
9 protected by the Second Amendment in the first
10 instance.

11 Obviously, that was an odious
12 classification, but those laws were generally
13 accompanied by stripping of other political
14 rights or ability to -- to participate in the
15 political community, and we think they were
16 justified at that time on that basis.

17 And so the reason we haven't invoked
18 them here is because we focused on the more
19 directly relevant laws that apply to those who
20 are indisputably among the people but
21 nevertheless fit within this enduring
22 constitutional principle that the legislature
23 has authority to draw lines and make predictive
24 judgments about those whose access to firearms
25 will create that untenable risk of danger.

1 CHIEF JUSTICE ROBERTS: Is someone who
2 drives 30 miles an hour in a 25-mile --
3 mile-an-hour zone -- does that person qualify as
4 law-abiding or -- or not?

5 GENERAL PRELOGAR: I think that that
6 wouldn't qualify to the extent that it's
7 classified as a misdemeanor or minor criminal
8 conduct under state law. And I do want to be
9 clear that we certainly think that wouldn't
10 apply under the not responsible category, but if
11 you're focusing on law-abiding in particular, we
12 think that history and tradition there support
13 the conclusion that you can disarm those who
14 have committed serious crimes.

15 So it's not just that any kind of --
16 of conduct that is an offense would qualify.

17 CHIEF JUSTICE ROBERTS: Is it -- are
18 you making a misdemeanor/felony distinction?

19 GENERAL PRELOGAR: That's the line
20 that history and tradition reflect, and so, yes,
21 I think that that is the relevant category with
22 respect to law-abiding citizens. But, again, I
23 would just emphasize here we're not directly
24 invoking the law-abiding aspect of the principle
25 because Mr. Rahimi didn't have the kind of -- of

1 criminal record that would justify disarmament
2 on that basis. Instead, our arguments here are
3 directed at the aspect of the standard focused
4 on those who are not responsible.

5 JUSTICE KAGAN: You say --

6 CHIEF JUSTICE ROBERTS: Responsibility
7 is a very broad concept. I mean, not taking
8 your recycling to the curb on Thursdays. I
9 mean, if you're -- if it's a serious problem,
10 you're -- it's irresponsible. Setting a bad
11 example, you know, by yelling at a basketball
12 game in a particular way.

13 It seems to me that the problem with
14 responsibility is that it's extremely broad, and
15 what -- what seems responsible to some --
16 irresponsible to some people might seem like,
17 well, that's not a big deal to others.

18 So what is the model? I mean, is --
19 is -- do you go back to what was irresponsible
20 at the common law or what's -- take a poll and
21 see if people think it's irresponsible, you
22 know, to get into a fistfight at a -- at a, you
23 know, sports event where tempers were running
24 high or -- or what?

25 GENERAL PRELOGAR: So I want to be

1 really clear that we're not using the term "not
2 responsible" to describe colloquially anyone who
3 you might describe as -- as demonstrating
4 irresponsibility in many of those contexts that
5 you just described in your hypotheticals.
6 Instead, we read this Court's case law and, in
7 particular, its articulation of that principle,
8 we're tracking the Court's language here, the
9 principle of responsibility, as being
10 intrinsically tied to the danger you would
11 present if you have access to firearms.

12 And I would draw a parallel here to
13 the principles the Court has articulated with
14 respect to sensitive places or with dangerous
15 and unusual weapons. In each of those
16 categories --

17 CHIEF JUSTICE ROBERTS: Well, just to
18 be clear, you're -- you're using "responsible"
19 as a placeholder for dangerous with respect to
20 the use of firearms?

21 GENERAL PRELOGAR: Correct. So that's
22 how we understand history and tradition in this
23 context. And the reason that we've used the
24 term "not responsible" is it -- it's because
25 it's the own -- the standard that this Court

1 itself has articulated in Heller and repeated in
2 McDonald and then re-repeated again in Bruen.

3 I think probably the reason the Court
4 has used the term "not responsible" is it gets
5 at the idea that some of the categories of
6 people who can be disarmed might not intend to
7 be dangerous. They might not be culpable in
8 that sense, like the mentally ill or minors, and
9 so I think responsibility gets at the idea that
10 they might not actually intend to be a danger
11 but, in fact, would present a danger --

12 JUSTICE KAVANAUGH: So there's no --

13 GENERAL PRELOGAR: -- if they had
14 firearms.

15 JUSTICE KAVANAUGH: -- no daylight at
16 all then between not responsible and dangerous?

17 GENERAL PRELOGAR: Yes. With respect
18 to responsibility in particular, our
19 understanding of what history and tradition
20 reflect and how this Court has used the term is
21 that it's identifying those whose possession of
22 firearms presents an unusual danger beyond the
23 ordinary citizen.

24 And, again, I would draw the -- the
25 analogy to sensitive places and to dangerous and

1 unusual weapons. In each of these contexts, the
2 Court is trying to identify those arms that are
3 especially dangerous, those places where
4 carrying weapons will pose unique dangers, and
5 those categories of people who, beyond the
6 ordinary citizen, possess a -- a particular
7 danger if they have access to firearms.

8 JUSTICE BARRETT: So it's not a
9 synonym for virtue?

10 GENERAL PRELOGAR: No. We're not
11 invoking a --

12 JUSTICE BARRETT: It's not -- you're
13 not pulling in the virtuous citizenry?

14 GENERAL PRELOGAR: We are not, no. We
15 think that here there is a direct link under the
16 responsible citizens principle to danger, and we
17 think that the disarmament provision I'm
18 defending here, Section 922(g)(8), clearly
19 satisfies that link because it requires
20 individualized findings of dangerousness and a
21 legislative consensus that individuals in this
22 category present the requisite level of danger.

23 JUSTICE BARRETT: Well, then how do
24 you know? I mean, I think there would be little
25 dispute that someone who was guilty, say, or

1 even had a restraining order -- that domestic
2 violence is dangerous, okay. So someone who
3 poses a risk of domestic violence is dangerous.

4 How does the government go about
5 showing whether certain behavior qualifies as
6 dangerous? Because this might be in a
7 heartland, but then you can imagine more
8 marginal cases.

9 So you've invoked the consensus among
10 the states, tradition of dangerousness, and I
11 don't think you'd get a lot of push-back because
12 this is violence after all, domestic violence.

13 What about more marginal cases?

14 GENERAL PRELOGAR: So I think that the
15 factors we think courts could apply in this
16 context -- and I should emphasize that this is
17 subject to meaningful judicial review -- would
18 fall into a couple of different categories.

19 At the outset, I would take the class
20 of disarmament provisions that require
21 individualized findings of dangerousness and say
22 those fall in the heartland, as you just
23 suggested. We have a judicial order here that
24 specifically found that Mr. Rahimi's conduct was
25 dangerous to his intimate partner.

1 Then I think you get to the category
2 of cases where a legislature might be making
3 categorical predictive judgments that
4 individuals with a certain characteristic or
5 quality or past conduct present a danger, and
6 those, I think, can be harder cases.

7 But the factors I would point to first
8 would be the breadth of the law, because we know
9 that the Second Amendment was entire -- was
10 intended to prevent disarming wide swaths of the
11 American public. So, if it's sweeping broadly
12 or indiscriminately and capturing people we
13 think of as ordinary citizens, that's going to
14 be a problem.

15 Next, I would look at the
16 justifications and the evidence before the
17 legislature. This would operate like sensitive
18 places. You could look and see is that place,
19 in fact, dangerous if there are weapons there.
20 So too you could look at the evidence the
21 legislature was consulting with respect to its
22 judgment of dangerousness.

23 And then the third factor would be
24 that legislative consensus. And I don't want to
25 suggest that this is dispositive either way

1 because some legislatures can be the first
2 mover, and if multiple legislatures enact an
3 unconstitutional law, that doesn't give you a
4 safe harbor, but I do think that legislatures
5 are best positioned to make these kinds of
6 predictive judgments about dangerousness, and if
7 you have the kind of consensus that we see here
8 with respect to Section 922(g)(8), that's
9 entitled to a lot of weight in the analysis.

10 And I don't want to say, Justice
11 Barrett, that this is always going to be easy
12 and that these factors will cash out in obvious
13 ways. I would say that I think that this is not
14 a close case and that Section 922(g)(8) is
15 clearly constitutional and fits within the
16 category of disarming irresponsible citizens
17 under these principles.

18 JUSTICE JACKSON: But can I ask you --

19 JUSTICE BARRETT: Thank you.

20 JUSTICE JACKSON: -- a question about
21 that, though? I guess I'm trying to understand
22 whether we can really be analyzing this
23 consistent with the Bruen test at the level of
24 generality of dangerousness. I -- I wonder
25 whether we need to be taking into account how

1 historically domestic violence in particular was
2 treated so that if we had evidence that, you
3 know, men who engaged in domestic violence
4 historically were actually not perceived as then
5 dangerous from the standpoint of -- of
6 disarmament, what -- what -- what -- what would
7 we do with that in this situation?

13 You know, the Court has recognized,
14 for example, that handguns were not in common
15 possession at the time of the founding and might
16 have been considered unusual weapons then. But
17 that's not what the Court would look at for
18 determining whether you could ban handguns
19 today.

20 JUSTICE JACKSON: But is that just
21 because that's a new technology? I mean, the --
22 the circumstance with respect to domestic
23 violence clearly existed back in the day, and
24 the question I guess -- I -- I'm just trying to
25 understand how the Bruen test works in a

1 situation in which there is at least some
2 evidence that domestic violence was not
3 considered to be, you know, subject to the kinds
4 of regulation that it is today.

5 And so, when we're looking under that
6 test for historical analogues, I guess, you
7 know, a series of regulations that relate to
8 disarming dangerous people, I -- I -- I need to
9 understand why that would be enough.

10 GENERAL PRELOGAR: Well, so let me try
11 to respond to the methodological point, and then
12 I want to respond to the specific questions
13 you've raised about how domestic violence was
14 treated at the founding and today.

15 On the methodological point, I don't
16 think that you could read Bruen to suggest that
17 we need regulations that specifically disarm
18 domestic abusers because that would be coming
19 dangerously close to imposing on the government
20 the requirement for an identical twin of a
21 regulation.

22 And, of course, original meaning isn't
23 dictated by the happenstance of whether there
24 was a law on the books in 1791 that happened to
25 disarm domestic abusers. I think you have to

1 come up a level of generality and use history
2 and tradition to help identify and discern the
3 enduring constitutional principles that define
4 and delimit the --

5 JUSTICE JACKSON: But what if we had a
6 --

7 GENERAL PRELOGAR: -- scope of the
8 Second Amendment right.

9 JUSTICE JACKSON: -- hypothetical --
10 what if -- what if we had a hypothetical in
11 which we actually determined based on the
12 historical record that domestic violence was not
13 considered dangerousness back in the day? I
14 mean, I -- I just don't know what we'd do with
15 that scenario.

16 GENERAL PRELOGAR: So I think, in that
17 scenario, you would recognize that it is
18 consistent with the Second Amendment's original
19 and enduring meaning that you can disarm
20 dangerous people, and the conception of what
21 regulations that permits today is not controlled
22 by Founding-Era applications of the principle.

23 JUSTICE JACKSON: Then what's the
24 point of going to the Founding Era? I mean, I
25 thought it was doing some work. But, if we're

1 still applying modern sensibilities, I don't
2 really understand the historical framing.

3 GENERAL PRELOGAR: The work that
4 history and tradition are doing is helping to
5 discern those principles in the first place.
6 The idea, for example, that you can ban firearms
7 in sensitive places, the fact is that the
8 Framers didn't ban firearms in schools even
9 though they existed at the Founding, but the
10 Court has already recognized that those
11 analogues and the historic banning of firearms
12 in places where they present safety concerns can
13 justify a modern-day regulation that does
14 require the banning of weapons in schools.

15 And so too here, I think the Court can
16 identify the constitutional principle, which
17 it's already articulated -- we're not asking the
18 Court to break new ground here -- and say today,
19 Section 922(g)(8) is a clear application of that
20 principle that you can disarm dangerous people.

21 And, Justice Jackson, I do want to
22 push back on the idea and the premise of your
23 question that there was evidence at the
24 Founding, for example, that you couldn't disarm
25 domestic abusers. It's true that the founders

1 didn't do that, but there's no evidence to
2 suggest that they would have thought that that
3 crossed a constitutional line.

4 And the fact that domestic violence
5 was subject to a very different legal and
6 societal regime at the time and was not viewed
7 as the kind of system that warrants systematic
8 governmental interference, I think, can't be
9 held against us now that we're looking at how
10 Congress is reacting to the profound threats
11 that armed domestic violence presents.

12 JUSTICE ALITO: General, one
13 provision, one section of the provision at issue
14 here, applies when a court order includes a
15 finding that the person represents a credible
16 threat to the physical safety of such intimate
17 partner or child.

18 But another provision applies when the
19 order by its terms explicitly prohibits the use,
20 attempted use, or threatened use of physical
21 force. That does not require a finding of
22 dangerousness.

23 Why is that necessary and how can that
24 be justified?

25 GENERAL PRELOGAR: I think,

1 ultimately, a court would have to find
2 dangerousness to enter a subparagraph (c)(2)
3 injunction based on the general equitable
4 principle that in order to enjoin conduct, you
5 have to think that conduct is reasonably likely
6 to occur.

7 This is a universal equitable
8 principle. It certainly applies in Texas and in
9 virtually all of the states. And I think what
10 it means is that a -- a judge who's considering
11 a request for a protective order wouldn't have a
12 basis in law to enter that subparagraph (c)(2)
13 prohibition on the use of physical force unless
14 the judge thought the force was sufficiently
15 likely to materialize.

16 JUSTICE ALITO: Well, we are told in
17 some of the amicus briefs that there are
18 situations in which the family court judge who
19 has to act quickly and may not have any
20 investigative resources faces a he/she -- a he
21 said/she said situation, and the judge just
22 says: Well, I'm going to issue an order like
23 this against both of the parties.

24 Do you agree that that occurs?

25 GENERAL PRELOGAR: No. I think that

1 that is largely a mischaracterization of what is
2 happening in the -- the state courts day in and
3 day out. With respect to mutual protective
4 orders in particular, the vast majority of
5 states -- we cite a source that counts 48 of
6 them -- either prohibit outright or
7 substantially restrict the entry of those kinds
8 of mutual protective orders.

9 And then I think the account is
10 basically trying to suggest or insinuate that
11 these state courts are nevertheless entering
12 protective orders that are not justified by the
13 facts and the law, and that just flies in the
14 face of the presumption of regularity that this
15 Court applies in this context.

16 Even the data on the ground don't bear
17 out the assertions that family courts are just
18 reflexively entering these kinds of protective
19 orders. By Respondent's own count in the
20 particular Tarrant County statistics he
21 collected, there were 522 requests for
22 protective orders, but that only resulted in 289
23 final protective orders.

24 So I think, even as a statistical
25 matter, it's incorrect to say that, invariably,

1 these orders are being entered without any basis
2 in fact or law to justify them.

3 JUSTICE ALITO: Is there anything that
4 a person who is subject to one of these orders
5 can do if the person claims that there wasn't
6 really sufficient notice or that due process
7 rights were violated in some way or that any
8 need for the protective order has expired?

9 Presumably, the person could go back
10 to the state court that entered the order. But,
11 if the state court is completely unreceptive to
12 that, is there any other avenue for relief?

22 JUSTICE ALITO: Yes. But --

23 GENERAL PRELOGAR: But --

24 JUSTICE ALITO: -- before the fact --
25 so the person -- the person thinks that he or

1 she is in danger and wants to have a firearm.
2 Is the person's only recourse to possess the
3 firearm and take -- you know, take their chances
4 if they get prosecuted?

5 GENERAL PRELOGAR: No. I mean, I
6 think the person would obviously have an ability
7 to, within the state court system, challenge the
8 entry of the protective order. But I don't
9 think there would be any basis to say you could
10 collaterally challenge that in the federal
11 prosecution. And, ultimately, this just
12 reflects the -- the history and tradition
13 demonstrating that there are certain categories
14 of people where we don't have to tolerate the
15 risks of armed domestic violence that they would
16 present, even in situations where they might
17 claim that they need to have a gun for other
18 reasons.

19 JUSTICE ALITO: There's no recourse
20 before the fact in federal court?

21 GENERAL PRELOGAR: So I think that
22 they could seek recourse in the state courts
23 themselves. They could protest the notice and
24 the opportunity for a hearing. But, if a court
25 has entered a protective order that complies

1 with the restrictions in 922(g)(8), then a
2 federal court can rely on that in enforcing this
3 prohibition.

4 JUSTICE ALITO: Is there any
5 possibility of administrative relief?

6 GENERAL PRELOGAR: I think that at the
7 state level, there are certain mechanisms in
8 place where people can seek relief. And one
9 important thing to emphasize is that these
10 protective orders are inherently time-limited.

11 It varies a little bit at the state
12 level. I've seen provisions that authorize the
13 imposition of these protective orders for six
14 months up to about five years. I think, most
15 commonly, they're in effect for just one year.
16 But, you know -- and the federal firearms
17 prohibition tracks the length and duration of
18 the protective order, so that also, I think,
19 means that the -- the disarmament lasts only so
20 long as the danger is in effect.

21 JUSTICE ALITO: One more question.

22 The Alameda County Public Defenders' amicus
23 brief says that some restraining orders are
24 permanent. Is that true? And if that is true,
25 how do you justify a permanent prohibition even

1 if the -- any danger has disappeared?

2 GENERAL PRELOGAR: So I'm not aware of
3 state law authority to -- to -- that authorizes
4 or that routinely enters permanent protective
5 orders. As I mentioned, this varies across
6 state law, so I don't want to suggest that
7 there's a universal answer here, but these
8 orders are generally time-limited or provide
9 mechanisms for courts to go back and review the
10 finding of dangerousness for purposes of
11 effectuating the -- the basic command of the
12 protective order.

13 JUSTICE ALITO: Thank you.

14 JUSTICE SOTOMAYOR: Just to be clear,
15 none of the situations that Justice Alito is
16 pointing to are the facts of this case, correct?

17 GENERAL PRELOGAR: That's right.

18 JUSTICE SOTOMAYOR: Or the facts of
19 this statute?

20 GENERAL PRELOGAR: That's right. So I
21 -- I --

22 JUSTICE SOTOMAYOR: And the
23 constitutionality of this statute is what's at
24 issue?

25 GENERAL PRELOGAR: Yes, and the Fifth

1 Circuit invalidated the statute on its face. I
2 do want to suggest that to the extent the Court
3 has been left with the impression in some of
4 these amicus briefs that the protective orders
5 are routinely entered -- are routinely entered
6 without a basis to conclude that someone
7 actually presents the individualized finding of
8 danger, I do not think there is any record or
9 evidence to support that conclusion here.

10 And I would say, again, this runs
11 counter to the presumption of regularity that
12 the Court ordinarily affords in this context,
13 but I think it also runs counter to Congress's
14 recognition and circumscribing of Section
15 922(g)(8) to ensure that it's covering those who
16 had notice and an opportunity for a hearing and,
17 therefore --

18 JUSTICE SOTOMAYOR: Counsel, in the
19 end, if there are due process failures in any
20 system, that'll be subject to a separate
21 challenge, correct?

22 GENERAL PRELOGAR: That's correct.
23 And Mr. Rahimi hasn't made a due process claim
24 here. He's not challenging Section 922(g)(8) on
25 that independent ground.

1 JUSTICE SOTOMAYOR: I'd like to go
2 back to your law-abiding or responsible citizen
3 category. I now understand why you think it's
4 -- it's appropriate. You think "dangerous" is
5 too limited because we have restrictions on the
6 age of people possessing firearms and on the
7 mentally ill, and they're not -- why do you --
8 and I understand they're not necessarily
9 dangerous, but I guess their lack of
10 responsibility or judgment could be questioned,
11 correct?

12 GENERAL PRELOGAR: What I would say is
13 we think that they are inherently dangerous,
14 even though they might not be culpable or
15 intending to create that kind of danger with
16 firearms.

17 JUSTICE SOTOMAYOR: Okay.

18 GENERAL PRELOGAR: That there's an
19 inherent risk based on their qualities or
20 characteristics that demonstrates that, as
21 compared to the ordinary citizen, allowing them
22 access to firearms is going to present that risk
23 of danger to self or others.

24 JUSTICE SOTOMAYOR: So, if we use
25 "danger" in the way you're defining it, as

1 broadly as you're defining it, you don't need
2 responsible citizen category?

3 GENERAL PRELOGAR: Yes. I think these
4 are essentially getting at the same concept. I
5 guess what I would say, Justice Sotomayor, is
6 that we have tracked the Court's own language
7 here. And I think it would be important, if the
8 Court wants to refer to concepts of
9 dangerousness, to make clear that it's not
10 backtracking from what it said in Heller and in
11 McDonald and in Bruen, that you can disarm those
12 who are not law-abiding, responsible citizens,
13 with the mentally ill as one of the exemplar
14 categories the Court held up to illustrate that
15 proposition.

16 And I think that the term
17 "responsible" gets at the -- the broader group
18 of people who can be disarmed even though they
19 might not be culpable precisely because of this
20 risk of danger. But, if the Court --

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 JUSTICE KAVANAUGH: Can you finish
24 that answer?

25 GENERAL PRELOGAR: I was going to say

1 but, if the Court were to refer to these
2 concepts of dangerousness, I just think it would
3 be important to make clear that it's not
4 backtracking from what it has said in prior
5 cases. And it's not just that the Court has
6 referred to this concept in the abstract. It's
7 actually embedded it in various aspects of how
8 Second Amendment analysis operates.

9 So, for example, the Court has said
10 background checks are okay because they're
11 intended to decide whether you're the kind of
12 ordinary, law-abiding, responsible citizen in
13 the first place, or that when you're looking at
14 whether a weapon is dangerous and unusual, you
15 should ask is this the kind of weapon that a
16 law-abiding, responsible citizen would need for
17 self-defense.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 GENERAL PRELOGAR: And so I just think
20 there's a risk of creating confusion about that.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. I guess, to get back to the beginning,
23 so why did you use the term "responsible" if
24 what you meant was dangerous?

25 I mean, "responsible" presents all

1 sorts of problems, and "dangerous" is sort of a
2 different set of considerations. I mean, if you
3 thought that our prior precedents were talking
4 about dangerous, it was a little confusing to
5 all of a sudden find "responsible" being the
6 operative term.

7 GENERAL PRELOGAR: Well, we relied on
8 the same phrasing the Court itself used when it
9 first articulated this -- this constitutional
10 principle in Heller. And so I think we were
11 trying to point out that the Court itself has
12 already recognized the category of regulation
13 that's consistent with original meaning under
14 the Second Amendment, and we just followed the
15 Court's lead in using that phrase, those who are
16 not law-abiding, responsible citizens.

17 And as I was just suggesting --

18 CHIEF JUSTICE ROBERTS: Well, but just
19 to be clear, your argument today is that it
20 doesn't apply to people who present a threat of
21 dangerousness? Whether you want to characterize
22 them as responsible or irresponsible, whatever,
23 the test that you're asking us to adopt turns on
24 dangerousness?

25 GENERAL PRELOGAR: Correct, for those

1 who are not responsible citizens. I do want to
2 be clear that we think there are different
3 principles that apply --

4 CHIEF JUSTICE ROBERTS: So dangerous
5 --

6 GENERAL PRELOGAR: -- with those who
7 are not law-abiding. So I just want to be clear
8 we don't think dangerousness is necessarily the
9 standard there, although there's obviously going
10 to be a lot of overlap. That's defined by its
11 own history and tradition. But we do think that
12 dangerousness defines the category of those who
13 are not responsible.

14 CHIEF JUSTICE ROBERTS: Thank you.

15 Justice Thomas?

16 JUSTICE THOMAS: If this were a -- a
17 criminal proceeding, then you would have a
18 determination of what you're talking about,
19 someone would be convicted of a crime, a felony
20 assault or something.

21 But, here, you have a -- something
22 that's anticipatory or predictive, where a court
23 is -- civil court is making the determination.
24 Just from an -- an analytical standpoint, would
25 there be a difference between a criminal

1 determination and a civil determination?

2 GENERAL PRELOGAR: So I don't think
3 that it would make a difference with respect to
4 whether the legislature can create categories of
5 people who are considered dangerous or not
6 responsible, and that's very much informed by
7 history and tradition here.

8 It is not the case that the only
9 disarmament provisions that have existed over
10 time targeting those who are dangerous are
11 provisions that focused on those with criminal
12 convictions. That is, of course, an important
13 component of the law-abiding standard in
14 particular, but we have a number of examples
15 from throughout history of those who were
16 disarmed even after civil adjudications or a
17 civil-like process, and that includes --

18 JUSTICE THOMAS: Could you give me an
19 example?

20 GENERAL PRELOGAR: Sure. So, for
21 example, mental illness. This was the category
22 that Heller held up as the quintessential
23 example of those who aren't responsible, even
24 though mental illness in our legal system has
25 always been adjudicated through civil

1 proceedings.

2 That was true, for example, of
3 loyalists. The disarmament provisions on
4 loyalists were enforced through those who were
5 refusing to take a loyalty oath, and so there
6 wasn't any necessity of a criminal conviction.

7 So too with those who were intoxicated. You
8 didn't need to show that they had actually been
9 criminally convicted in order to disarm them.

10 So I think that there is a
11 longstanding tradition here of recognizing that
12 individuals can be determined through this
13 predictive judgment to be dangerous even in the
14 absence of a criminal conviction.

15 JUSTICE THOMAS: Just one last
16 question. This is a judicial determination
17 here. Would you be able to make the same
18 arguments if it had been a -- an administrative
19 determination?

20 GENERAL PRELOGAR: I think it would be
21 far more difficult to defend an executive branch
22 or an administrative determination because of a
23 separate Second Amendment principle that guards
24 against granting executive officials too much
25 discretion to decide who and who cannot have

1 firearms.

2 In the -- there was some history about
3 that in -- in England, of course, but in the
4 American legal tradition, these principles have
5 been deployed through legislative judgments or
6 through express judicial findings of
7 dangerousness. So I don't think that we could
8 point to the same history and tradition of
9 giving executive branch officials that
10 discretion.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: Suppose -- suppose
14 that a jurisdiction enacted a concealed carry
15 permitting regulation that is almost identical
16 to the one we invalidated in Bruen, except that
17 it requires an applicant to show -- to show that
18 he or she is sufficiently responsible.

19 Would that be constitutional?

20 GENERAL PRELOGAR: So, if that were
21 implemented through a system of executive
22 discretion, just as I was discussing with
23 Justice Thomas, I think that there could be
24 additional principles that come into play that
25 would guard against that kind of licensing

1 regime.

2 Now, to the extent that that kind of
3 background system was intended just to implement
4 the -- the bases for disarmament that reflect
5 legislative judgments and, you know, in other
6 words, to check for whether you have a history
7 of -- of commitment to a mental institution or a
8 criminal record or so forth, then I think those
9 objective standards could be deployed as part of
10 a background check system, and -- and Bruen
11 specifically suggested as much.

12 JUSTICE ALITO: One more question. In
13 response to my question about the provision that
14 prohibits the possession of a firearm by someone
15 against whom an order prohibiting violence has
16 been entered and the provision doesn't on its
17 face require a finding of dangerousness, as I
18 recall, your answer was that state laws
19 generally do require that and anyway, equitable
20 principles require that.

21 Now suppose someone is later
22 prosecuted for violating that provision. Could
23 -- would it be a defense for that person to say
24 that the state law in question did not require
25 such a finding and, in fact, there was no such

1 finding in my case?

2 GENERAL PRELOGAR: I don't think that
3 that would provide a basis to collaterally
4 challenge the entry of the protective order in
5 the federal prosecution. And we don't think
6 that this -- that there should be a system of
7 as-applied challenges in this context, because I
8 think that what we know is that Congress is
9 entitled to make categorical judgments,
10 predictive judgments of dangerousness based on
11 history and tradition even in -- if there are
12 really edge cases where that predictive judgment
13 wasn't actually necessary to guard against a
14 danger there.

15 But, if what you're suggesting is that
16 there might be a state out there that is
17 ordering judges to enter the subparagraph (c)(2)
18 prohibition without any basis to think that
19 physical force is likely, I think a person would
20 have a very strong due process challenge to that
21 kind of law, and that law would likely be
22 invalidated on the separate basis that it
23 doesn't provide due process if it's requiring
24 courts to enter relief that the facts and the
25 law don't support.

1 CHIEF JUSTICE ROBERTS: Justice

2 Sotomayor?

3 Justice Kagan?

4 JUSTICE KAGAN: General, there seems
5 to be a fair bit of division and a fair bit of
6 confusion about what Bruen means and what Bruen
7 requires in the lower courts.

8 And I'm wondering if you think that
9 there's any useful guidance, in addition to
10 resolving this case, but any useful guidance we
11 can give to lower courts about the methodology
12 that Bruen requires be used and how that applies
13 to cases even outside of this one?

14 GENERAL PRELOGAR: Yes. I think that
15 there are three fundamental errors and
16 methodology that this case exemplifies and that
17 we are seeing repeated in other lower courts and
18 that this case provides an opportunity for the
19 Court to clarify that Bruen should not be
20 interpreted in the way that Respondent is
21 suggesting.

22 The first error we see is that
23 Respondent has asserted here and other courts
24 have embraced the idea that the only thing that
25 matters under Bruen is regulation. In other

1 words, you can't look at all of the other
2 sources of history that usually bear on original
3 meaning.

4 And I don't think that that can be
5 squared with this Court's precedents, starting
6 with Heller, which consulted a -- a wide variety
7 of historical sources, the same kind of evidence
8 we've come forward with here about English
9 practice, state constitutional precursors,
10 treatises, commentary, state judicial decisions.
11 All of that is relevant evidence about the scope
12 of the Second Amendment right, and I think the
13 Court could make clear that it's not a
14 regulation-only test.

15 Second, I think that looking just at
16 regulations themselves, one of the fundamental
17 problems with how courts are applying Bruen is
18 the level of generality at which they're parsing
19 the historical evidence.

20 Court after court has looked at the
21 government's examples and picked them apart to
22 say: Well, taking them one by one, there's a
23 minute -- minute difference between how this
24 regulation operated in 1791 or the ensuing
25 decades and how Section 922 provisions operate

1 today. And I think that comes very close to
2 requiring us to have a dead ringer when Bruen
3 itself said that's not necessary.

4 The way constitutional interpretation
5 usually proceeds is to use history and
6 regulation to identify principles, the enduring
7 principles that define the scope of the Second
8 Amendment right. And so we think that you
9 should make clear the courts should come up a
10 level of generality and not nit-pick the -- the
11 historical analogues that we're offering to that
12 degree.

13 And, third and finally, I think that
14 in many instances, courts are placing
15 dispositive weight on the absence of regulation
16 in a circumstance where there's no reason to
17 think that that was due to constitutional
18 concerns.

19 So, for, example here, we don't have a
20 regulation disarming domestic abusers. But
21 there is nothing on the other side of the
22 interpretive question in this case to suggest
23 that anyone thought you couldn't disarm domestic
24 abusers or couldn't disarm dangerous people.
25 And in that kind of context, I think to suggest

1 that the absence of regulation bears
2 substantially on the meaning of the Second
3 Amendment is to take a wrong turn.

4 It's contrary to the situation the
5 Court confronted in Bruen, where there was a lot
6 of historical evidence to say states can't
7 completely prohibit public carry, and against
8 that evidence, you might say that the absence of
9 regulation is significant.

10 But, here, there's nothing on the
11 other side of this interpretive question, and I
12 think that that just shows that you shouldn't
13 hold the absence of a direct regulation against
14 us.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: Good morning,
19 General. I want to follow up on your response
20 to Justice Kagan, I think your second response,
21 the level of generality question.

22 Do you -- do you think the level of
23 generality -- I take your point you've got
24 surety laws, you've got affray laws, you've got
25 a lot of historical evidence, maybe not the

1 historical twin.

2 And -- and you're saying we should
3 overlook that in the same way I think you would
4 say -- I want to make sure you'd say the
5 analysis also applies similarly to the -- to the
6 right side of the ledger, the regulation side on
7 the right side. We're not looking for is -- is
8 it -- is it a Fowler or is it -- is it a musket.

9 Is -- is that a fair understanding of
10 -- of -- of how you see the law?

11 GENERAL PRELOGAR: Yes. We think that
12 it applies in both directions, both in
13 understanding the right itself and in
14 understanding the limitations that are built
15 into that right.

16 JUSTICE GORSUCH: Okay. And you --
17 you had a discussion about the length of time
18 that some of these orders last, and you
19 emphasized that you're only arguing for a
20 temporary dispossession.

21 And I -- I guess I -- I'm wondering,
22 on a facial challenge, do we need to get into
23 any of that, right? Is -- normally, we ask on a
24 facial challenge, is there any set of
25 circumstances in which the dispossession would

1 be lawful? And there may be an as-applied if
2 it's a lifetime ban. That would come to us and
3 that would be a separate question. Is that how
4 you see it too?

5 GENERAL PRELOGAR: I agree that that
6 would be a separate question, yes. I think that
7 there is good reason to reject as-applied
8 challenges if and when they come --

9 JUSTICE GORSUCH: Sure.

10 GENERAL PRELOGAR: -- before the Court
11 because of the categorical judgments that we
12 think history and tradition support, but I
13 acknowledge that here it's only a facial
14 challenge.

15 JUSTICE GORSUCH: Okay. And -- and
16 along the same lines on the facial challenge
17 aspect of it, do we need to resolve (c)(2) and
18 the questions that Justice Alito was asking
19 given that the -- the defendant, the
20 plaintiff before us -- the Respondent, sorry,
21 is -- is -- is -- has been adjudicated under
22 (c)(1) and we actually have a finding of a
23 credible threat. The dangerousness argument
24 seems most apparent there. And we don't know
25 much about how all states administer (c)(2)

1 regimes.

2 GENERAL PRELOGAR: So I agree that
3 this is a facial challenge, and the Court could
4 confine its analysis to (c)(1). I guess I would
5 make just two responses to that.

6 JUSTICE GORSUCH: Sure.

7 GENERAL PRELOGAR: One is to say that
8 I think it's going to be difficult for the Court
9 to avoid the (c)(2) issue.

10 JUSTICE GORSUCH: Of course.

11 GENERAL PRELOGAR: We ourselves have a
12 pending petition where the Fifth Circuit has
13 invalidated an application of the statute in a
14 (c)(2) context. So, unless you want to see me
15 here again next term on this issue, I would say
16 that --

17 JUSTICE GORSUCH: Always delighted to
18 see you, General.

19 (Laughter.)

20 GENERAL PRELOGAR: -- the issue has
21 been fully briefed, and we think it's an
22 important part of the statute.

23 But the second thing I would say is
24 that even if you wanted to confine your analysis
25 to (c)(1), I do think that at the very least,

1 you would have to reject some of the key
2 premises of Respondent's arguments in this case,
3 and that relates to the colloquy I had with
4 Justice Kagan, for example, the level of
5 generality --

6 JUSTICE GORSUCH: Right.

7 GENERAL PRELOGAR: -- at which he's
8 parsing the regulations, the fact that we don't
9 have a domestic violence example in particular,
10 his arguments that legislatures just can't
11 disarm anybody, that persons can't be disarmed,
12 that kind of thing.

13 JUSTICE GORSUCH: I follow all of
14 that. Got you. And the same thing goes with
15 due process. We don't have a due process
16 challenge before us, and so we don't need to
17 resolve any of that either.

18 GENERAL PRELOGAR: That's correct. He
19 did not make a due process claim here.

20 JUSTICE GORSUCH: Okay. And then,
21 lastly, some lower courts have recognized a
22 duress defense in -- to 922 charges. You know,
23 someone's invaded their home and they use it in
24 self- -- a gun that they have illegally in
25 self-defense.

1 What's the government's view on that?

2 GENERAL PRELOGAR: So, you know, I --

3 I want to be careful here because I haven't

4 actually reviewed the cases that you must be

5 referring to where those defenses --

6 JUSTICE GORSUCH: Yeah, there are a

7 few out there.

8 GENERAL PRELOGAR: -- have been made.

9 I would have to take a look at those to provide

10 you with a well-thought-out government view on

11 that issue. Obviously, we recognize that there

12 are distinctive legal doctrines like necessity

13 and defense that can come into play. And so I'm

14 sorry that I don't have a --

15 JUSTICE GORSUCH: What would you

16 counsel us to do about them? I know it's not

17 fair standing at the podium not having reviewed

18 them, but there are these historical common-law

19 defenses of necessity and duress when it's not

20 aimed at the -- the subject of the protective

21 order, but a home invasion, for example.

22 GENERAL PRELOGAR: So I would urge the

23 Court not to say anything about those doctrines

24 here, where we've got a facial challenge and

25 where, certainly, Mr. Rahimi isn't making that

1 kind of defense to a Section 922(g)(8)
2 conviction. I would save for another day how
3 the Court might think about those issues where
4 they're squarely presented.

5 JUSTICE GORSUCH: Thank you very much.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: Just to follow up
9 on your colloquies with the Chief Justice and
10 Justice Sotomayor, I just want to make sure I
11 have the terminology exactly correct as you see
12 it.

13 One category you think the government
14 can prohibit possession by those who are not
15 law-abiding, and you said that encompasses
16 serious offenses, is that correct?

17 GENERAL PRELOGAR: That's correct,
18 which we would define by felony-level
19 punishment.

20 JUSTICE KAVANAUGH: Okay. And the
21 second is the government can prohibit possession
22 by those who are not responsible, and by that,
23 you mean those who are dangerous, is that
24 correct?

25 GENERAL PRELOGAR: Yes, those whose

1 possession of firearms would present a danger to
2 themselves or others, but they don't have to be
3 intentionally dangerous, which gets at the
4 culpability question.

5 JUSTICE KAVANAUGH: Good. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: My question is on
9 the law-abiding and responsible also. I guess I
10 understood our use of that phrase in our prior
11 cases to describe the would-be gun owners in
12 those cases. Like, we're not talking about who
13 might be able to be disarmed. There might be
14 other people. But all of those people were
15 law-abiding and responsible, and there was no
16 allegation that they weren't.

17 But it seems to me that in your brief
18 and in parts of the argument the government is
19 asking for that to be a test. But I don't think
20 we presented it as a test. Do you see a reason
21 for us to use that as the test, law-abiding and
22 responsible, given some of the ambiguities in
23 that phrase?

24 GENERAL PRELOGAR: So I wouldn't
25 describe it as a test. I guess what I would do

1 is describe it as the relevant category, the
2 shorthand to get at the idea that legislatures,
3 consistent with the Second Amendment, can take
4 action to disarm particular types of people
5 whose possession of weapons present these types
6 of concerns, either that they have committed
7 serious crimes or present a danger.

8 And I would use this as shorthand in
9 the same way the Court has referred to the
10 sensitive places principle or the dangerous and
11 unusual weapons principle.

12 JUSTICE BARRETT: So could I just say
13 it's dangerousness? Let's say that I agree with
14 you that when you look back at surety laws and
15 the affray laws, et cetera, that it shows that
16 the legislature can make judgments to disarm
17 people consistently with the Second Amendment
18 based on dangerousness.

19 GENERAL PRELOGAR: We certainly --

20 JUSTICE BARRETT: Why can't I just say
21 that?

22 GENERAL PRELOGAR: We certainly agree
23 that that's what history and tradition show. We
24 think that defines the scope of the category of
25 those who are not responsible. We don't think

1 dangerousness is the standard with law-abiding,
2 and I recognize you might have some different
3 views on that, Justice Barrett. You don't need
4 to resolve that issue here. This is a -- this
5 is a case just about someone who is not
6 responsible in the form of being dangerous.

7 So, yes, we would be happy with a
8 decision that says legislatures for time
9 immemorial throughout American history have been
10 able to disarm those who are dangerous.

11 JUSTICE BARRETT: But you're trying to
12 save, like, the range issue. So you're not
13 applying dangerousness to the crimes?

14 GENERAL PRELOGAR: That's correct. We
15 think that there are additional arguments that
16 can be made to defend felon disarmament and that
17 those depend on the unique history and tradition
18 with respect to criminal conduct. And so we
19 would hope to have the opportunity to present
20 those arguments and perhaps --

21 JUSTICE BARRETT: In that case
22 perhaps.

23 GENERAL PRELOGAR: -- persuade you in
24 a future case, yes.

25 JUSTICE BARRETT: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice

2 Jackson?

3 JUSTICE JACKSON: Yes. Just to
4 clarify in response to what you said to Justice
5 Barrett, the determination of dangerousness
6 would be evaluated based on what modern
7 legislatures think counts as dangerous? We're
8 not bound to what qualified as dangerous back in
9 the day?

10 GENERAL PRELOGAR: That's correct. We
11 think that once the Court recognizes the
12 principle that history and tradition support
13 this durable principle that you can disarm
14 dangerous people, then the question becomes for
15 any follow-on challenge whether the legislature
16 with respect to a particular category has
17 appropriately deemed these individuals dangerous
18 and, therefore, fitting within that historical
19 tradition.

20 And I think the inquiry there would
21 not be confined to how the Founders thought
22 about dangerousness. Instead, it would turn on
23 some of the factors that I was discussing
24 earlier with Justice Barrett about the breadth
25 of the law, the evidence that supports the

1 legislative judgment --

2 JUSTICE JACKSON: The kinds of things
3 we used --

4 GENERAL PRELOGAR: -- and the
5 consensus.

6 JUSTICE JACKSON: The kinds of things
7 we used to look at with the tiers of scrutiny,
8 what's the justification for this? Is that what
9 you're saying?

10 GENERAL PRELOGAR: No, I don't think
11 that this is just a revival of some form of
12 means-ends scrutiny because we wouldn't be
13 asking the -- a court to balance the intrusion
14 on the individual interest against the weight of
15 the government's interest. Instead, this is
16 about whether the legislature has properly
17 classified a law as falling within the principle
18 in the first place.

19 And so it's not about balancing
20 between those two different interests but,
21 rather, about looking at the legislature's
22 predictive judgment of dangerousness and
23 determining ultimately whether it's justified.

24 JUSTICE JACKSON: All right. So let
25 me just ask you about your first methodology --

1 methodological error that you identified in
2 response to Justice Kagan. You say that the
3 courts are focusing too much just on regulation,
4 legislation, and not on other indicia of what
5 the historical tradition is.

6 But, when you were talking with
7 Justice Thomas at the beginning, you seemed to
8 suggest that the tradition with respect to
9 slaves and Native Americans would not be subject
10 to consideration for this. In other words, only
11 the regulation as it relates to certain segments
12 of society, I guess, count underneath this
13 historic traditions test?

14 GENERAL PRELOGAR: Well, the reason we
15 haven't invoked those other laws is because we
16 think they were applications of a separate
17 principle under the Second Amendment, which is
18 that those who are not considered among the
19 people can be disarmed. That, of course, has
20 the textual hook, and the Court in Heller
21 defined that as those who are not part of the
22 political community. And when we looked at how
23 those laws operated, they traditionally stripped
24 the affected individuals from all rights to
25 participate in the political community --

1 JUSTICE JACKSON: I understand that --

2 GENERAL PRELOGAR: -- and, therefore

3 --

4 JUSTICE JACKSON: -- but where does
5 that leave us with respect to the application of
6 our test? I'm trying to understand if there's a
7 flaw in the history and traditions kind of
8 framework to the extent that when we're looking
9 at history and tradition, we're not considering
10 the history and tradition of all of the people
11 but only some of the people as per the
12 government's articulation of the test?

13 GENERAL PRELOGAR: Well, I certainly
14 think that those laws are a part of history. We
15 don't think that they're a part of history that
16 are directly relevant to the separate question
17 at issue here. And so we've instead pointed to
18 a variety of other laws that we think more
19 clearly bear on the issue of when legislatures
20 can disarm even those who are among the people.

21 JUSTICE JACKSON: All right. And,
22 finally, let me just ask you prospectively from
23 the standpoint of a legislator today -- I mean,
24 we've been talking about sort of the
25 retrospective view of this, you know, when

1 there's an existing gun control measure that's
2 being challenged, how do we determine by looking
3 at history whether or not it's constitutional.

4 But let's say I'm a legislator today
5 in Maine, for example, and I'm very concerned
6 about what has happened in that community, and
7 my people, the constituents, are asking me to do
8 something.

9 Do you read Bruen as step one being go
10 to the archives and try to determine whether or
11 not there's some historical analogue for the
12 kinds of legislation that I'm considering?

13 GENERAL PRELOGAR: No. I think that
14 Bruen requires a close look at history and
15 tradition and analogue to the extent they exist
16 and are relevant for purposes of articulating
17 the principle.

18 But, once you have the principle
19 locked in -- and, here, the principle would be
20 you can disarm those who are not responsible or
21 dangerous, however the Court wants to phrase
22 it -- then I don't think it's necessary to
23 effectively repeat that same historical
24 analogical analysis for purposes of determining
25 whether a modern-day legislature's disarmament

1 provision fits within the category.

2 Instead, I think you would look at the
3 factors I was articulating earlier in response
4 to Justice Barrett's question about the evidence
5 before the legislature of dangerousness, the
6 consensus view, whether legislatures routinely
7 think of this circumstance as being dangerous,
8 the breadth of the law, and other factors along
9 those lines.

10 JUSTICE JACKSON: But, if the
11 principle has not yet been established, what do
12 I do as a legislator?

13 GENERAL PRELOGAR: So I think, if
14 there is no relevant principle that a law would
15 slot into, like sensitive place regulation or
16 dangerous person regulation, then you would
17 conduct the Bruen analysis in order to help try
18 to identify those principles of the Constitution
19 that define the scope of the Second Amendment
20 right.

21 But it wouldn't just be a hunt for a
22 particular, precise historical analogue. I -- I
23 think that that's really a caricature of Bruen,
24 and that would make the Second Amendment a true
25 outlier because there's no constitutional right

1 that's dictated exclusively by whether there
2 happened to be a parallel law on the books in
3 1791.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Wright.

8 ORAL ARGUMENT OF J. MATTHEW WRIGHT
9 ON BEHALF OF THE RESPONDENT

10 MR. WRIGHT: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 My friend described several times the
13 government's principle that in this case, they
14 are not relying on any analogues that were
15 directed at people who were not part of the
16 people, outside the community, the national or
17 political community entirely.

18 That means loyalist laws are entirely
19 off the analogical spectrum here because
20 loyalists were also pervasively deprived of all
21 of the rights of the people and citizenship.
22 They were enemies. The government said so in
23 its Bruen amicus brief.

24 In response to Justice Gorsuch's
25 question about how the courts of appeals handle

1 the issue of self-defense, necessity, duress, we
2 cite a case on page 11 of our brief, United
3 States versus Penn, I remember that case very
4 well, it will show you how they handle it.
5 There's effectively not one. I mean, even brief
6 fleeting possession that lasts a little bit
7 longer while being chased by people, not enough.
8 So there is no real keeping for self-defense
9 exception to this principle.

10 And in regards to I think it was
11 Justice Alito's question of duration of
12 protective orders, by default, they can be
13 permanent in Alabama, Colorado, Montana,
14 Washington. No specific limit in Florida,
15 Michigan, North Dakota, Vermont. Ten years in
16 Arkansas, five years in California, Ohio, South
17 Dakota. And in Texas, where the default is two
18 years, if the judge finds or a finding is made
19 that felony violence was committed, it can be
20 five years and the time is tolled, for instance,
21 when someone's in jail. And so, while it may be
22 the case that if we counted noses, exactly 51 or
23 52 are around a year or so, it is not the case
24 that they are short.

25 Now the danger with any kind of

1 historical inquiry is like the person looking
2 down a well. So it feels like what the
3 government is doing is looking down the dark
4 well of American history and seeing only a
5 reflection of itself in the 20th and 21st
6 Century and saying that's what history shows.

7 When Congress enacted Section
8 922(g)(8) in 1994, it acted without the benefit
9 of Heller, McDonald, and Bruen, so we shouldn't
10 be surprised that they missed the mark. They
11 made a one-sided proceeding that is short a
12 complete proxy for a total denial of a
13 fundamental and individual constitutional right.

14 At this time, I would welcome
15 questions from the Court.

16 JUSTICE THOMAS: Counsel, would you
17 take a few -- a bit of your time to recount
18 exactly what happened below in this case, not in
19 the district court but in state court?

20 MR. WRIGHT: So what happened in state
21 court we know very little about for certain. We
22 have the order, which was attached as an exhibit
23 to the federal complaint, and the order reflects
24 certain findings.

25 We have shown that those findings are

1 incredibly common in this one county in Texas,
2 but if you did an electronic search of appellate
3 cases in Texas with the words "credible threat"
4 and "physical safety," I think you would only
5 find three unpublished appellate cases all from
6 this county.

7 So there are words in it, but it
8 wasn't a disputed type of finding. It was an
9 agreed order. So my client, who was
10 unrepresented, and a -- a district attorney, a
11 Tarrant County assistant district attorney,
12 entered into a stipulation. The order was
13 entered. The language is in the order. It's in
14 the joint appendix. You can read it. And --
15 and that's it.

16 Now I believe that, Justice Thomas,
17 more happened. You could -- we can figure out
18 what happened if we pulled out the records, but
19 those aren't relevant. What happens in the
20 civil proceeding doesn't matter for purposes of
21 922(g)(8).

22 JUSTICE THOMAS: Well, I think what's
23 -- what does matter is we're assuming
24 dangerousness or irresponsibility. Take your
25 pick. And we are -- we have a very thin record,

1 and I'm trying to get a sense of what actually
2 happened in this case.

3 MR. WRIGHT: So there are allegations
4 that were taken in the federal pre-sentence
5 report, and -- and those are the ones that made
6 their way into the opinion below.

7 And if I could then distinguish
8 between the facts that the court found for
9 purposes of fixing a sentence in this case and
10 the facts that could be contested at a jury, the
11 facts that are the subject of the guilty plea,
12 the ones that are essential to the conviction,
13 in terms of the former category, there was a
14 finding that there was, you know, a physical
15 assault, that someone had attempted to intervene
16 and that Mr. Rahimi had fired a gun into the air
17 at that time. Those -- and -- and there
18 are pending charges right now in Tarrant County
19 for three misdemeanor offenses that are the same
20 allegations that are the -- so -- so the -- the
21 federal pre-sentence report found that those
22 actions preceded and were the cause for the
23 protective order.

24 JUSTICE SOTOMAYOR: I --

25 JUSTICE GORSUCH: Oh, please.

1 JUSTICE SOTOMAYOR: Go ahead.

2 JUSTICE GORSUCH: Are you sure?

3 JUSTICE SOTOMAYOR: Yes.

4 JUSTICE GORSUCH: Okay. Counsel,

5 you -- you -- you mentioned the self-defense,
6 duress, necessity concerns in your opening. But

7 this is a facial challenge, right, so we have to
8 ask is it unconstitutional in any application.

9 and that would include cases where those

10 circumstances don't exist. We don't have to

11 address those in this case, do we?

12 MR. WRIGHT: Your Honor.

13 do have to address them because the existence of

14 such a defense is part of the crime, you know,

15 THE DEFINITION OF THE CRIME. AND SO, IN,

lower scales have consistency held, there

17 either is no such defense or it is not so common
18 rare, then that plays into --

19 JUSTICE GORSUCH. Hen's cooch rare. 1

haven't heard that in a while. I like that.

21 MR. WRIGHT: That -- that plays into

22 the facial analysis of the statute. And I think

23 one of the areas we diverge with my friend is
24 this facial versus as-applied distinction, whi

25 even this Court I was happy to read finds that

1 distinction amorphous sometimes. I certainly
2 do.

3 But, in this case, by a facial
4 challenge, we mean the elements specifically
5 target conduct that is explicitly protected by
6 the plain text of the Second Amendment.

7 JUSTICE GORSUCH: And if -- if --
8 if -- if I were to disagree with you on that,
9 though, there -- there would be an as-applied
10 challenge available later in those cases, right?

11 MR. WRIGHT: An as-applied challenge
12 -- well, if you were to disagree with me, yes,
13 that's correct, Justice Gorsuch.

14 JUSTICE GORSUCH: And the same thing
15 when it comes to temporary dispossession. I
16 understand your concern about permanent
17 dispossession, but, again, that isn't what's
18 necessarily before us in a facial challenge,
19 where we have to ask is it unconstitutional in
20 all of its applications, right?

21 MR. WRIGHT: Your Honor, that -- that
22 test for faciality, I -- I think, is primarily
23 remedial. It typically comes up in the civil
24 context where someone is suing to enjoin the
25 enforcement of a statute and -- and so the

1 Salerno test it's called, you know, comes into
2 play as to, typically, that assumes there is a
3 valid application or a space of valid
4 application of the statute, and then the
5 complaint is either there's too much outside or
6 my case is outside or something like that.

7 Ours is a facial challenge in the way
8 that Lopez was a facial challenge, where the
9 facts of Lopez were clearly within Congress's
10 power under the Commerce Clause. This Court
11 found the facts of that case were Person A was
12 going to pay Lopez \$40 to give that gun to
13 Person C after school.

14 That's within the commerce power, but
15 the statute itself was not within Congress's
16 power to enact. And so that statute failed as
17 it then existed, the pre-amendment version of
18 the Gun-Free School Zones Act, on its face.

19 JUSTICE BARRETT: I -- I just wanted
20 to go back to your conversation with Justice
21 Thomas, and I guess this touches on what you
22 just said to Justice Gorsuch about the thinness
23 of the proceeding in state court.

24 She did submit a sworn affidavit
25 giving quite a lot of detail about the various

1 threats, right? So it's not like he just showed
2 up and the judge said credible finding of
3 violence?

4 MR. WRIGHT: So, Justice Barrett, I
5 know that to be true. And I personally looked
6 at it. That's correct. And it's a matter of
7 public record that you can see that.

8 JUSTICE BARRETT: I -- I've got it.

9 MR. WRIGHT: Right. So -- so -- and I
10 don't mean to suggest that. I mean that in
11 terms of what was necessary for the federal
12 prosecution, so what we could have defended this
13 case on if it went to the jury, the federal
14 jury, I mean, for the criminal prosecution, what
15 happened before, whether it was good or bad,
16 doesn't matter under the statute.

17 And we take that as a given from this
18 Court's decision in Lewis, where there's sort of
19 a -- a conceded constitutional problem with the
20 underlying felony prosecution.

21 JUSTICE GORSUCH: Well, you -- you
22 haven't raised a due process challenge to the
23 underlying felony prosecution either, right?

24 MR. WRIGHT: Well, Your Honor, and,
25 again --

1 JUSTICE GORSUCH: It's a Second
2 Amendment challenge strictly speaking.

3 MR. WRIGHT: That's correct, Your
4 Honor. And we take that from Lewis. Lewis says
5 what Congress intended when it passed the Gun
6 Control Act in 1968 was those matters are off
7 the table.

15 So we take that as a given when we
16 come to a statute like this, that even if we
17 could show a due process issue with respect to
18 the issuance of the protective order, that would
19 be no defense against the federal prosecution.

20 But, if I'm wrong about that, I'm
21 happy to hear it.

22 JUSTICE GORSUCH: It would have been
23 in the state prosecution, though?

24 MR. WRIGHT: I'm sorry?

25 JUSTICE GORSUCH: It would have been

1 in the state prosecution potentially, in the
2 state protective order proceeding, and you could
3 have had a due process argument and raised it
4 there.

5 MR. WRIGHT: You're right, Justice
6 Gorsuch, and that gets to a really important
7 point here. Because Congress has made this sort
8 of a per se automatic disarmament and it has
9 tied it to the issuance of a protective order,
10 there is no due process required before a court
11 enters an order enjoining me from committing
12 physical abuse against someone else. That is
13 not a protected right.

14 So what we have is a proceeding that's
15 designed to adjudicate small rights or no rights
16 at all. And then, based on the results of that
17 proceeding and even the findings that are
18 entered in that proceeding, we take very
19 consequential actions that go against an
20 individual's fundamental right to keep arms, of
21 citizenship.

22 So I do not believe -- at least I'm
23 not aware of any due process that would apply
24 with respect to the part of the order that
25 922(g)(8) cares about, the one that says you

1 cannot abuse that person. And so, in that
2 sense, there's no due process claim we could
3 raise.

4 So that's -- so that's the thing.

5 Congress has taken a big right, the Second
6 Amendment, and has --

7 JUSTICE GORSUCH: You're -- you're not
8 saying that before a protective order is
9 entered, there's no due process rights that an
10 individual has, are you? I mean, is that a
11 position you really want to take?

12 MR. WRIGHT: For a (g)(8) order, so an
13 order that forbids further abuse.

14 JUSTICE GORSUCH: I'm talking about in
15 state court.

16 MR. WRIGHT: Right. Right. So --

17 JUSTICE GORSUCH: You're saying
18 there's no -- the Due Process Clause is silent
19 before a protective order can be entered against
20 an individual?

21 MR. WRIGHT: To the extent that the
22 only remedy granted by that order is forbidding
23 abuse, forbidding physical abuse, I don't think
24 that you have any right to due process before
25 that is entered because you have no right to

1 abuse anyone. It's just not. The incentives --

2 JUSTICE GORSUCH: You have no right to
3 murder someone, but we give you a trial.

4 MR. WRIGHT: Right. So --

5 JUSTICE GORSUCH: Right? And so
6 there's always process before a right or life,
7 liberty, or property is taken from you of some
8 kind. What measure of due process depends upon
9 facts, circumstances -- I -- I'm not -- I'm not
10 talking about that. But I'm surprised to hear
11 you say that the Fifth and the Fourteenth
12 Amendments' Due Process Clauses don't apply to
13 an individual who is being subject to a
14 protective order.

15 MR. WRIGHT: I think depending on what
16 the protective order required. So those --
17 those probably do kick in in the same way that
18 if this were a -- a true disarmament proceeding.
19 So this Court I don't think has announced the
20 criteria that would be required in something
21 like a red flag law, but something like that.
22 So everyone's attention is focused on the loss
23 of firearm rights.

24 There would be certain requirements.
25 And -- and we could argue about it. I would

1 submit it would probably need to be clear and
2 convincing evidence, but it would certainly need
3 to be fundamentally fair because this is a
4 fundamental right.

5 That's not what any state does for a
6 civil protective order. There's typically no
7 incentive and often no real opportunity to
8 contest the issuance of the order. And in many
9 cases, people are happy to consent to the orders
10 because they don't want to be around the person
11 anymore either.

12 JUSTICE BARRETT: But, counsel, I just
13 want to clarify, you're right you don't have,
14 you know, the right to commit violence against
15 anyone, but this protective order says a whole
16 lot more than that. I mean, he's prohibited
17 from communicating with his family, with going
18 within 200 yards of her residence. So I think
19 that paints a little bit of a different picture
20 in the due process rights that might apply.

21 MR. WRIGHT: I agree, Your Honor, that
22 the Due Process Clause would impose limits
23 against involuntary termination of access to
24 one's children, for instance. So I don't mean
25 to suggest -- and -- and, Justice Gorsuch, if

1 that's what I implied, I don't mean to. I don't
2 mean to suggest that the Due Process Clause
3 doesn't -- it doesn't matter what happens in one
4 of these proceedings.

5 JUSTICE JACKSON: So, counsel --

6 JUSTICE KAGAN: Mr. Wright, may -- may
7 I ask just about your basic argument here? And
8 I'm just going to read you a sentence from the
9 brief, and I want to know whether, you know,
10 that's your essential argument.

11 It says, "The government has yet to
12 find even a single American jurisdiction that
13 adopted a similar ban while the founding
14 generation walked the earth."

15 So is that what we should be looking
16 for? And if we don't find that similar ban, we
17 say that the government has no right to do
18 anything?

19 MR. WRIGHT: Your Honor, I think
20 that's largely what Bruen says. However, I
21 don't think it has to be so narrow. So, if the
22 government could affirmatively prove from the
23 historical tradition of either American firearms
24 laws or even I would be willing to spot them the
25 way that we have treated other fundamental

1 constitutionally protected rights, if they could
2 tie it to one of those historical traditions,
3 that would be good enough under the logic of
4 Bruen, if not the exact rule we're disputing
5 now.

6 JUSTICE KAGAN: I guess I'm not quite
7 sure what the answer means. I mean, I took that
8 sentence to be saying we're looking for a
9 regulation that even if it's not every jot and
10 tittle is essentially targeting the same kind of
11 conduct as the regulation under review.

19 And -- and so I guess I'm asking you
20 to comment on those two ways of understanding
21 Bruen.

22 MR. WRIGHT: I think both
23 methodological positions lead to the same
24 result, which is affirmation of the decision
25 below. It's not just something that is about

1 domestic violence or a ban that's punishable by
2 exactly 10 years. In other words, that's the
3 way that some of the amici have described what
4 we're arguing for.

5 I'm saying there's no ban, there's no
6 history of bans for people who were part of the
7 national community. They don't exist. I'm
8 saying that the plain text of the Second
9 Amendment, the way that it distinguished from
10 the English common-law tradition, I'm saying
11 that the early commentators like St. George
12 Tucker and William Rawle, they all said, if
13 you're just keeping the firearm --

14 JUSTICE KAGAN: So -- but that does
15 suggest, I mean, that you're looking for a ban
16 on domestic violence. And, you know, 200 some
17 years ago, the problem of domestic violence was
18 conceived very differently. People had a
19 different understanding of the harm. People had
20 a different understanding of the right of
21 government to try to prevent the harm. People
22 had different understandings with respect to
23 pretty much every aspect of the problem.

24 So, if you're looking for a ban on
25 domestic violence, it's not going to be there.

1 MR. WRIGHT: Justice Kagan, I'm
2 looking for a ban. I'm looking for a ban, some
3 criminal punishment for just the keeping of a
4 firearm. That's what I'm looking for. And it's
5 based not on the loss of status of citizenship,
6 you know, or being outside the community. I'm
7 looking for a ban that applies to a
8 rights-holding American citizen. I mean, that's
9 -- I'd start with that.

10 Short of that, again -- and I suspect
11 the response to that is this Court has
12 tentatively approved felon in possession. But
13 felons are so different. They have all kinds of
14 process. There's a long tradition of denying
15 people convicted of infamous crimes all manner
16 of rights of citizenship or not.

17 So, if I could just set that aside,
18 there's no ban because, at the time, when the
19 people of the time actually wrote about it, they
20 wrote that there's no right to misuse a firearm.
21 So the allegations that have been made against
22 my client, we do not contend that behavior is
23 protected by the Second Amendment.

24 The behavior that's protected is the
25 keeping of arms. The behavior that is also

1 protected is the carrying of arms, but I would
2 concede -- I would concede there is a strong
3 historical tradition of providing more
4 restrictions against the right to public carry
5 because that's where you encounter other people.

6 This is someone who's keeping a
7 firearm in his own home. The oldest American
8 tradition at least of a federal government,
9 someone who everyone agreed was subject to the
10 Second Amendment, passing that kind of law, was
11 1968. This tie is older than that so-called
12 tradition, Your Honor. It -- it just -- it's
13 20th Century, late 20th Century. And so we
14 disagree at a very fundamental level of whether
15 there is this tradition.

16 JUSTICE ALITO: So you -- your
17 argument is that except for someone who has been
18 convicted of a felony, a person may not be
19 prohibited from possessing a firearm in the
20 home, is that correct?

21 MR. WRIGHT: I would add one more
22 caveat to it, Justice Alito, and that is if
23 severe criminal punishment will result, because
24 that is something that Heller itself and Bruen
25 itself took into this balance, because what --

1 the right that's protected is the right of
2 someone who, by keeping the firearm, you know,
3 is used -- for lawful -- someone who's keeping a
4 firearm for lawful purposes, how does this
5 regulation infringe on that? If it is a small
6 fine or even loss of the weapon, maybe that
7 doesn't violate that right. You could make it
8 illegal, you're prohibited from keeping a
9 weapon, but if we figured out that you had a
10 weapon in your bedroom, you -- you -- you may
11 have to pay for it, you know, but you're not
12 going to go to prison for 10 or 15 years.
13 You're not going to get felony liability.

14 I think all of those things together
15 are incredibly important about this ban because
16 they are -- it is not based on loss of rights of
17 citizenship. It is applied against
18 rights-holders. It is a total ban. And it is
19 punishable by an incredible amount of prison
20 time.

21 JUSTICE ALITO: So let me give you
22 this example. Suppose a state judge determines
23 after a hearing that a man has repeatedly
24 threatened to shoot the members of his family,
25 has brandished the gun, has terrified them, and

1 orders the man not -- enters a restraining order
2 preventing that man from possessing a firearm
3 any place, including in the home.

4 Is that constitutional?

5 MR. WRIGHT: I think the answer is
6 probably yes if he -- I think it probably is. I
7 would want to know more about what the
8 historical tradition showed, but, certainly,
9 courts have always had broad power against the
10 people who are brought before them. And --

11 JUSTICE ALITO: So --

12 MR. WRIGHT: -- I think that would be
13 consistent with the historical --

14 JUSTICE ALITO: So the difference you
15 see between that order and prosecution for --
16 for violating the order is the fact that the
17 latter imposes a -- a felony punishment?

18 MR. WRIGHT: That's one difference,
19 and it's an important difference under this
20 Court's case law.

21 Another difference is that the
22 defendant had a real opportunity, you know, in
23 standing before the court to say either, number
24 one, I didn't do that or, number two, something
25 was wrong with me, I'll never do that again.

1 But -- and I'll move across the country so I can
2 assure you that they will be safe, but I'm very
3 frightened to be, you know, without my arms. So
4 you would have a chance to entreat with the
5 person who's putting in a restriction.

6 If the restriction itself was
7 unlawful, the person would have a chance to
8 appeal it to a higher authority, to an appellate
9 court, and say this judge got it wrong, you
10 know, this is not lawful either under the
11 Constitution or under this state's substantive
12 law.

13 All of those things are different in
14 the situation that you describe, and I think
15 they are constitutionally significant
16 differences between that and what we have here.

17 CHIEF JUSTICE ROBERTS: So are you
18 suggesting, if there's a sufficient showing of
19 dangerousness, that can be a basis for disarming
20 even with respect to possession in the home?

21 MR. WRIGHT: Again, it's a -- it's a
22 much closer question for me because it is -- I
23 have yet to see a -- a historical example of
24 that applied against a citizen. And it would
25 certainly be a last resort type of situation.

1 So --

2 CHIEF JUSTICE ROBERTS: Well, to the
3 extent that's pertinent, you don't have any
4 doubt that your client's a dangerous person, do
5 you?

6 MR. WRIGHT: Your Honor, I would want
7 to know what "dangerous person" means. At the
8 moment --

9 CHIEF JUSTICE ROBERTS: Well, it means
10 someone who's shooting, you know, at people.
11 That's a good start.

12 (Laughter.)

13 MR. WRIGHT: So -- so that's fair.
14 I'll say this. If a -- imagine a statute that
15 had been written that was the what Zackey Rahimi
16 has been accused of statute, and very prescient
17 legislatures, you know, way ahead of the game.

18 If you've done all of these nine
19 things and it's proven to a constitutionally
20 significant level of abstraction, you don't get
21 to keep your gun, we're going to come and take
22 it from you, and -- and you just -- sorry, you
23 just don't. Constitutional, 100 percent.

24 JUSTICE KAGAN: I thought you just
25 said no. I thought you said there's no history

1 of any kind of ban for anything that doesn't
2 relate to felonies.

3 MR. WRIGHT: And -- and -- and I -- I
4 want to be clear that the -- there is not one
5 that I found anyway. I think it would stem from
6 a court's either historical equitable powers or,
7 you know, the rights of the government to
8 literally protect someone from imminent danger
9 to life and limb.

10 There are examples, some of the early
11 justice of the peace manuals that talk about, if
12 you see someone who is on the way to commit a
13 crime with a weapon, you can take the weapon
14 away from them and you don't have to institute
15 proceedings immediately. However, you do have
16 to institute them pretty quick after that.

17 JUSTICE BARRETT: I'm so confused,
18 because I thought your argument was that there
19 was no history or tradition, as Justice Kagan
20 just said, of this kind -- of disarmament in
21 this circumstance. But now it kind of sounds
22 like your objection is just to the process.

23 Like, are you making Judge Ho's
24 argument only?

25 MR. WRIGHT: No, Your Honor, I'm not

1 making Judge Ho's argument only. The -- the law
2 that's before us right now is a ban. It's a ban
3 that's passed by a legislature. And it -- it is
4 -- you -- you can't get around it. You -- you
5 can't even ask the state court to say, you know,
6 I'll accept a protection order, a stay-away
7 order, just give me permission to keep firearms
8 for my own self-defense. That will not prevent
9 this ban from kicking in. And it has severe
10 penalties that result from it, and it applies
11 everywhere, even in the home.

12 I think all of those things together
13 make this statute unconstitutional. I
14 understood the question to be, what about
15 something else? Would that be constitutional?
16 And I think so, but we would need to know --
17 we'd need to do a full workup on the history and
18 tradition that supported that. You know, that's
19 -- that's something that I don't think this
20 Court can answer in this case because there's no
21 such law before the Court.

22 CHIEF JUSTICE ROBERTS: Well, but
23 it -- it's a facial challenge.

24 MR. WRIGHT: Right.

25 CHIEF JUSTICE ROBERTS: And I

1 understand your answer to say that there will be
2 circumstances where someone could be shown to be
3 sufficiently dangerous that the firearm can be
4 taken from him.

5 MR. WRIGHT: Yes.

6 CHIEF JUSTICE ROBERTS: And why isn't
7 that the end of the case?

8 MR. WRIGHT: Because --

9 CHIEF JUSTICE ROBERTS: All you need
10 to do is show that there are circumstances in
11 which the statute can be constitutionally
12 applied.

13 MR. WRIGHT: Because this statute is
14 -- it -- it doesn't take anyone's firearm from
15 them. I mean -- I mean, that's -- that's one
16 way that it would be different, because there is
17 a historical tradition of separating people from
18 their firearms when there's an imminent threat
19 of lawful violence on the way to do it.

20 And I think, again, it's consistent
21 with the Court's traditional equitable powers
22 that if nothing short of surrender would protect
23 life and limb, the court's going to be able to
24 order surrender in the same way that if the
25 police see that someone has, you know, suicidal,

1 they have reason to believe they're suicidal, of
2 course, the police can go and take the firearm
3 away from them. They can't keep it forever, and
4 they can't put somebody in prison for 10 years
5 because he had the firearm there.

6 JUSTICE JACKSON: So I hear you
7 isolating bans by the legislature as opposed to
8 circumstances in which a court might have
9 particular facts in this way.

10 Is that what you're doing? You're
11 sort of saying, bans by the legislature are a
12 different thing than we have facts of imminent
13 potential danger and someone runs to the court.
14 There might be a history and tradition of that,
15 but you see that as different than a ban by the
16 legislature such as what is happening here?

17 MR. WRIGHT: Yes.

18 JUSTICE JACKSON: All right. So I
19 guess I'm just trying to understand, maybe this
20 is an aside, but your brief does indicate that
21 you are aware of historical bans, laws banning
22 firearm possession by disfavored categories of
23 people.

24 And -- and the government talks about
25 this as well. And so do you agree with the

1 government that those kinds of bans we don't
2 look at or care about when we're trying to
3 figure out whether or not there's history and
4 tradition here?

5 MR. WRIGHT: Yes. And I don't want to
6 speak for my friend. I understood the
7 government's position to be we don't look at
8 those laws in this case. It sounds like they
9 may still be on the table for some other person
10 who's outside the political community.

11 I say you don't look at them at all
12 because, number one, they're awful, they're
13 terrible laws. We should not give credence to a
14 suggestion that a -- a legislator in 1870 in the
15 south -- you know, we should -- so we should not
16 --

17 JUSTICE JACKSON: But we have a
18 history and traditions test. I -- I guess I --
19 I'm a little troubled by having a history and
20 traditions test that also requires some sort of
21 culling of the history so that only certain
22 people's history counts.

23 So what do we do with that? Isn't
24 that a flaw with respect to the test?

25 MR. WRIGHT: Your Honor, I think what

1 you do is the Bruen test starts with the text.
2 And so, ultimately, historical tradition as I
3 understand it is something the Court does to
4 make sure its textual interpretation is correct
5 and consistent with the original understanding
6 of the amendment.

7 So, in the situation that you're
8 describing, those laws, they were not people who
9 were part of the community. They never -- they
10 weren't seen as the people. And when these laws
11 were challenged, including in this very Court,
12 that was the reason. Well -- well, this Court
13 was not dealing with a disarmament law but other
14 laws that targeted those groups.

15 JUSTICE JACKSON: So does that mean
16 only Reconstruction Era as opposed to -- sorry,
17 only Foundational Era as opposed to
18 Reconstruction Era sources are on the table
19 here?

20 MR. WRIGHT: For purposes of the
21 Second Amendment, as -- and applied against the
22 federal government, yes, absolutely, it is only
23 Founding Era sources and immediately after the
24 Founding Era, so people who understood they were
25 bound by that.

1 Like, again, I don't see these two
2 steps of Bruen as completely separate pieces.
3 You know, you pass the text point and you move
4 on. The Court is trying to get at the meaning
5 of the text, the original public meaning of the
6 text.

7 JUSTICE JACKSON: And in your view
8 with respect to domestic violence, are we
9 looking for history and tradition in the
10 Reconstruction Era about how regulation was
11 happening in the circumstance of domestic
12 violence or no?

13 MR. WRIGHT: I don't --

14 JUSTICE JACKSON: I mean, the
15 government says it can be done at the level of
16 regulation of dangerous people with respect to
17 firearms. But you seem to be suggesting -- and
18 I think this is going back to a question that
19 Justice Kagan asked -- that what we're looking
20 for is Reconstruction Era sources, I suppose,
21 that applied to the regulation of white
22 Protestant men related to domestic violence.

23 Is that sort of the level that we are
24 focused on when we're trying to find a history
25 and tradition?

1 MR. WRIGHT: No, Your Honor. And --
2 and -- and I may not have been clear before. I
3 think it's the Founding Era and not the
4 Reconstruction Era when we're talking about the
5 -- the federal government.

6 JUSTICE JACKSON: I apologize, the
7 Founding Era.

8 MR. WRIGHT: And -- and -- and it has
9 got to be the people, someone who would have
10 been understood to be part of the people, a
11 rights-holding citizen of the United States.

12 JUSTICE JACKSON: Right. The people
13 doing what, though? Do we drill down further
14 and say it's the people, which in that case did
15 not include all the people, but, fine, we've
16 identified the relevant people who are being
17 regulated. Is it enough that they were being
18 regulated with respect to just dangerousness?
19 Or are we looking for a regulation concerning
20 this set of circumstances?

21 MR. WRIGHT: It doesn't have to be
22 specific to domestic violence. I'm not saying
23 that.

24 JUSTICE JACKSON: Okay.

25 MR. WRIGHT: Violence, interpersonal

1 violence, dueling, any -- robbery. So, in other
2 words, society understood violence, understood
3 dangerous people. Danger existed. But they
4 rejected at every point the type of
5 dangerousness disarmament principle that the
6 government is advocating.

7 JUSTICE KAGAN: Do you think that the
8 Congress can disarm people who are mentally ill,
9 who have been committed to mental institutions?

10 MR. WRIGHT: Setting aside an
11 enumerated powers problem, so they're in the
12 District of Columbia or something like that,
13 there's definitely a tradition for restricting
14 sale or provision of weapons to the mentally ill
15 that -- all the -- all the -- all the examples
16 that the government has cited are late. They're
17 post-Civil War sources, I think, for that. If
18 not -- so I think maybe is the answer to the
19 tradition.

20 JUSTICE KAGAN: I'll tell you the
21 honest truth, Mr. Wright. I feel like you're
22 running away from your argument, you know,
23 because the implications of your argument are
24 just so untenable that you have to say no,
25 that's not really my argument.

1 I mean, it just seems to me that your
2 argument applies to a wide variety of disarming
3 actions, bans, what have you, that -- that we
4 take for granted now because it's -- it's so
5 obvious that people who have guns pose a great
6 danger to others and you don't give guns to
7 people who have the kind of history of domestic
8 violence that your client has or to the mentally
9 ill or what have you.

10 So I guess -- you know, I guess I'm
11 asking you to clarify your argument because you
12 seem to be running away from it because you
13 can't stand what the consequences of it are.

14 MR. WRIGHT: Your Honor, I am running
15 away from interest balancing because I
16 understand that that same sort of argument could
17 have been made in Bruen, could have been made in
18 Heller, could have been made in McDonald, and,
19 in fact, were made in all of those cases, right?

20 Legislatures have made a judgment that
21 it is dangerous to have people carrying weapons
22 about. Legislatures made a judgment it's
23 dangerous for handguns specifically to be
24 possessed. And the Court didn't defer to those
25 late or mid-20th Century judgments or even early

1 20th Century judgments about dangerousness in
2 that scenario.

3 Instead, the Court said we are going
4 to follow our understanding of the original
5 public meaning of the text and -- as illuminated
6 by the historical tradition of firearms
7 regulation at the margins. So I -- I guess
8 that's what I want to say, is that if there's no
9 such tradition -- so if you couldn't -- I -- I'm
10 supposing that we would find examples of people
11 having firearms removed from them if they are an
12 imminent danger to others.

13 That historical record has not been
14 built in this case because that's not the kind
15 of law that we have. I do believe that it's
16 there, and I could give some additional examples
17 where I think we can find support for that.
18 But, if not, if there were no historical support
19 for that, we would be left with what the text
20 says, which is you have a right to keep arms.

21 And so, in that sense, that would --
22 that would end.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas, anything further?

1 JUSTICE THOMAS: Briefly. You -- just
2 to be clear, what you're arguing, you say that
3 the proceedings in state court -- let's assume
4 that -- that there was no 922 consequence. What
5 would be the effect of that order? You -- would
6 you -- you would not be challenging that order?

7 MR. WRIGHT: Well, I wouldn't be
8 challenging the order, but --

9 JUSTICE THOMAS: Yeah.

10 MR. WRIGHT: -- but -- but -- but Mr.
11 Rahimi might.

12 JUSTICE THOMAS: My -- my question --
13 the reason I'm asking you that, you made the
14 point that that was a -- a small matter and it
15 has huge consequences. I think you said that
16 even if Respondent moved to another state or
17 across the country, the consequences would be
18 the same, even though he would present no danger
19 in Texas.

20 And just to be clear, are you --
21 you're not challenging the state court aspect of
22 this?

23 MR. WRIGHT: That's -- that's correct,
24 Your Honor.

25 JUSTICE THOMAS: But solely -- and

1 your language was it was a per se violation or
2 automatic violation of 922, and that is your
3 problem?

4 MR. WRIGHT: The -- the possession of
5 firearms. It's the bootstrapping of what is a
6 proceeding that is one-sided and does not have
7 any kind of historical connection to the loss of
8 citizenship rights, bootstrapping that as like a
9 conclusive presumption to a right that the
10 federal Constitution guarantees against
11 Congress.

12 JUSTICE THOMAS: So there was some
13 talk about possibly challenging this under the
14 Due Process Clause later on or a as-applied
15 challenge to this. How would -- how would you
16 see that taking place if this is an automatic
17 disarmament?

18 MR. WRIGHT: I -- I will be interested
19 to read how it would proceed. My understanding
20 is that you can't raise it in a 922(g)
21 prosecution. I base that on Lewis and on what
22 we understand Congress's intent to be in
23 enacting these categorical bans.

24 In the state court itself, when it's
25 been raised in state courts, they typically

1 point to the federal statute and say, well,
2 Congress -- you know, Congress, you know, said
3 it's okay, so -- so, you know, if you have this
4 kind of order, then you lose. So I think
5 922(g)(8) plays a role in that sense.

6 And if the issue is that you have tied
7 a larger constitutional right to sort of a
8 smaller right, it's not clear what -- what
9 imposes that due process requirement on the
10 state court. And so I think that this was an
11 agreed order because he doesn't have counsel, he
12 doesn't have the ability to do it, and -- and --
13 and he's ultimately willing, I guess, to -- to
14 -- to submit, maybe to avoid the attorneys'
15 fees, which is a way that they apparently get
16 people to agree to these orders.

17 That would not be a fundamentally fair
18 system if it were a red flag or a disarmament
19 provision.

20 CHIEF JUSTICE ROBERTS: Justice Alito?
21 Justice Sotomayor?
22 Justice Kagan?
23 Justice Gorsuch?
24 Justice Kavanaugh?
25 JUSTICE KAVANAUGH: One specific thing

1 in the government's reply brief that I want to
2 get your response to. At page 21 of the reply
3 brief, the government notes the background check
4 system that Congress has created to prevent the
5 sale of firearms to prohibited persons.

6 Domestic violence protective orders are promptly
7 incorporated into that system. It's resulted in
8 more than 75,000 denials, the government says,
9 based on these protective orders in the last 25
10 years.

11 According to the government, under
12 your argument, that system could no longer stop
13 persons subject to those domestic violence
14 protective orders from buying firearms. Just
15 want to get your response to that.

16 MR. WRIGHT: I think that's wrong for
17 a couple of reasons, Justice Kavanaugh. First
18 of all, the same system incorporates state
19 prohibitions against firearm possession, and so,
20 if there is a lawful provision imposed by state
21 law or by a judge in a court, it could be
22 incorporated into the background check system.

23 Second, I would have to concede that
24 there is a historical tradition of limiting who
25 citizens, people within the community, could

1 provide weapons to outside the community, if you
2 will. And so it could be that that historical
3 tradition would support a restriction on
4 commercial sale of arms. That's an example that
5 -- LRJ was one that's -- maybe has a different
6 framework. So that would -- that's an argument
7 that could be made in favor of that sort of
8 provision or sort of background check process
9 that would not go away with 922(g)(8).

10 And just as a highly technical matter,
11 I understand that to be a function of 922(d)(8),
12 which, again, is restricting what the licensed
13 firearms dealer can do, not (g)(8), which is the
14 restriction on possession by the citizen. This
15 is what my client went to prison for.

16 And so I -- but, on the other hand, if
17 you have a right to possess a firearm, then,
18 certainly, the acquisition of a firearm is
19 closely connected to that and constitutional
20 implications would come into play. So I just
21 don't have a firm view on whether or not a law
22 that operated more like some of the earliest
23 20th Century laws that sort of dealt with
24 acquisition of firearms, that might survive
25 constitutional scrutiny.

1 JUSTICE KAVANAUGH: So it's possible
2 the government's correct in what it says?

5 JUSTICE KAVANAUGH: Is that what you
6 just said?

7 MR. WRIGHT: No, I don't think it's
8 possible. It is possible that it would be
9 unconstitutional to deny people the right to
10 purchase a firearm from a licensed dealer, yes,
11 I think that is possible.

12 But I suspect that both existing law
13 and constitutional laws would allow many of
14 those same people to be denied if we worked our
15 way through the relevant provisions that are
16 keeping them from doing it.

17 JUSTICE KAVANAUGH: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: So the restraining
21 order prevented your client from possessing a
22 firearm, and it also immediately suspended his
23 handgun license. Was that unconstitutional?

24 MR. WRIGHT: Your Honor, just to take
25 issue with the second part of the question

1 first, that language, suspending handgun
2 license, that's in all of these Tarrant County
3 orders. That's part of the boilerplate --

4 JUSTICE BARRETT: But, still, it says
5 it's ordered that his handgun license is
6 immediately suspended.

7 MR. WRIGHT: Right.

8 JUSTICE BARRETT: So just let's --
9 let's go with the -- with the order's language.
10 Did that violate the Second Amendment, putting
11 922 aside?

12 MR. WRIGHT: I think, to answer that
13 question, then we -- we would bring the whole
14 record, the record that was before the court and
15 terms, and -- and the client agreed to the
16 order. So it would be very difficult to --

17 JUSTICE BARRETT: But you're going --
18 you're going back to the process.

19 MR. WRIGHT: Right.

20 JUSTICE BARRETT: You know, she had
21 the affidavit. Let's -- let's imagine they --
22 they go back and forth. Let's -- let's imagine
23 it's a more fulsome process and she actually
24 testifies and he cross-examines her. Whatever.
25 Let's assume there's no process problem.

1 Would it be unconstitutional then to
2 deprive your client of his handgun license and
3 his -- his -- prohibit him from possessing a
4 firearm? Because I assume that -- you've said
5 there's no analogue of -- of this kind of
6 domestic violence thing.

7 MR. WRIGHT: Right. Or the analogue
8 would be in terms of what courts could do
9 through equitable powers otherwise. I think
10 that would have to be the analogue.

11 JUSTICE BARRETT: But -- but they
12 can't, through their equitable powers, do
13 something that would violate the Constitution,
14 right?

15 MR. WRIGHT: Right. Right. So, if
16 the finding was that nothing short of surrender
17 of firearms would prevent damage to life and
18 limb, that would be constitutional. So I -- I
19 don't know if that answers your question or not.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: I guess I'm just
23 trying to get a clear answer to whether or not
24 we're looking for historical analogues related
25 to domestic violence or something broader.

1 You -- you -- you suggested -- and
2 your brief I'm now revisiting suggests that the
3 government cites no laws punishing members of
4 the American political community for possessing
5 firearms in their own homes based on
6 dangerousness, irresponsibility, crime
7 prevention, violent history, or any other
8 character trait.

9 So you just say there are no bans that
10 relate to any of those things.

11 MR. WRIGHT: That's my understanding
12 of the historical record that we have in this
13 case, yes.

14 JUSTICE JACKSON: And if the
15 government were to convince us that there was a
16 ban related to, say, dangerousness, do you lose?
17 I thought your point was, even if there is some
18 dangerousness tradition, it has to be about
19 domestic violence.

20 MR. WRIGHT: That's not my point, Your
21 Honor.

22 JUSTICE JACKSON: Okay.

23 MR. WRIGHT: That's -- that's --
24 that's not something that we're -- people could
25 argue that, but I don't think anybody -- none of

1 our amici have argued that. Certainly, there's
2 some point at which someone could be separated
3 from a firearm.

4 This law doesn't do that at all for
5 anyone. This is just: Can you be punished for
6 keeping a firearm? And I think that the -- the
7 text of the Constitution says no, the early
8 commentators would say no at least as far as
9 Congress doing it, and the historical tradition
10 all say no.

11 So, in terms the level of abstraction,
12 I don't see how this case presents that because
13 there's just nothing, no bans. No bans against
14 rights-holders.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, General?

19 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
20 ON BEHALF OF THE PETITIONER

21 GENERAL PRELOGAR: Thank you, Mr.
22 Chief Justice.

23 My friend began his argument this
24 morning in response to a question from Justice
25 Kagan saying that he does read Bruen to require

1 the government to come forward with a precise
2 historical analogue in order to justify a
3 modern-day firearms regulation.

4 I think that is a clearly incorrect
5 reading of Bruen. Unfortunately, it's a
6 profound misreading that many lower courts have
7 been adopting. And I think that it's important
8 for the Court to understand the destabilizing
9 consequences of that reading in the lower
10 courts.

11 Just last week, a court invalidated
12 Section 922(g)(1), the felon prohibition
13 statute, on its face as applied to the most
14 violent and horrific crimes imaginable on the
15 theory that the government didn't have a
16 sufficiently precise historical analogue to
17 justify a permanent ban on felons.

18 Many courts now, several district
19 courts, have credited as-applied challenges to
20 Section 922(g)(1) by armed career criminals who
21 have multiple convictions for aggravated
22 assault, drug trafficking, armed robbery,
23 clearly violent crimes, because we don't have a
24 sufficient historical analogue disarming those
25 subject to precisely those crimes at the

1 Founding. And a court has also invalidated on
2 its face the provision of federal law that
3 prohibits possession of firearms with
4 obliterated serial numbers, again, on the theory
5 that we don't have a Founding Era analogue that
6 is sufficiently precise that says you have to
7 serialize firearms possession.

8 I think that those are clearly
9 untenable results. They are profoundly
10 destabilizing, and Bruen doesn't require them.

11 Once the Court corrects the
12 misinterpretation of Bruen, then I think the
13 constitutional principle is clear. You can
14 disarm dangerous persons. And under that
15 principle, Section 922(g)(8) is an easy case.
16 It's an easy case for three reasons.

17 First, it requires an individualized
18 finding of dangerousness. Now I think I heard
19 my friend to concede today that those kinds of
20 individualized findings of dangerousness do
21 suffice for disarmament, and he questions
22 whether the process in state court judicial
23 proceedings is sufficient.

24 But that ultimately is a procedural
25 claim that should be adjudicated under the Due

1 Process Clause, and I think that it ignores two
2 fundamental features that are relevant here.
3 First, the Section 922(g)(8) guarantees notice
4 and a hearing. It only permits disarmament in
5 those situations, so the most fundamental
6 protection of due process is validated under
7 this provision.

8 And, second, that there is a
9 presumption of regularity that exists in this
10 context. And to -- to say or suggest that all
11 of these state court procedural orders,
12 protective orders, are fundamentally flawed or
13 inherently unreliable, I think, would override
14 that presumption in this case and be profoundly
15 unsettling for the state courts that are on the
16 front lines here trying to protect victims of
17 domestic violence.

18 I think as well that these principles
19 equally demonstrate subparagraph (c)(2)'s
20 validity. We think that there is an inherent
21 requirement that the Court find that the threat
22 of physical force is likely to occur in order to
23 justify entering that kind of judicial finding,
24 and that provides a basis to uphold Section
25 922(g)(8) with respect to all of its

1 applications.

2 The second reason why this is an easy
3 case is because there is a legislative
4 consensus. It is not just Congress, but 48
5 states and territories share this view that
6 armed domestic violence needs to be guarded
7 against and that disarmament is a permissible
8 legislative response. And so I think that
9 further fortifies the congressional judgment.

10 And the third reason why Section
11 922(g)(8) should be an easy case is because it
12 does guard against a profound harm. A woman who
13 lives in a house with a domestic abuser is five
14 times more likely to be murdered if he has
15 access to a gun.

16 And it's not just the harms in the
17 home. It extends to the public and to police
18 officers as well. I was struck by the data
19 showing that armed -- that domestic violence
20 calls are the most dangerous type of call for a
21 police officer to respond to in this country.
22 And for those officers who die in the line of
23 duty, virtually all of them are murdered with
24 handguns.

25 Section 922(g)(8) takes account of

1 those concerns, and, here, history and tradition
2 confirm common sense. Congress can disarm armed
3 domestic abusers in light of those profound
4 concerns.

5 So we'd ask the Court to correct the
6 Fifth Circuit's methodological errors and
7 reverse.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:37 a.m., the case
12 was submitted.)

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Official - Subject to Final Review

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